

900 KAR 6:090. Certificate of need filing, hearing, and show cause hearing.

RELATES TO: KRS 45A.340, 216B.015, 216B.020(2)(a), 216B.040, 216B.062(1), 216B.095(1), 216B.990

STATUTORY AUTHORITY: KRS 194A.030(1)(c)4., 216B.040(2)(a)1., (b), 216B.085, 216B.086, 216B.090

NECESSITY, FUNCTION, AND CONFORMITY: KRS 216B.040(2)(a)1. and (b) require the Cabinet for Health and Family Services to administer Kentucky's certificate of need program, to promulgate administrative regulations as necessary for the program, and to conduct public hearings in respect to certificate of need applications and revocations of certificates of need. KRS 216B.085, 216B.086, and 216B.090 establish requirements for certificate of need, revocation, and reconsideration hearings. This administrative regulation establishes the requirements for filing, hearing, and show cause hearings necessary for the orderly administration of the certificate of need program.

Section 1. Definitions. (1) "Affected person" is defined by KRS 216B.015(3).

(2) "Cabinet" is defined by KRS 216B.015(6).

(3) "Certificate of Need Newsletter" means the monthly newsletter that is published by the cabinet regarding certificate of need matters and is available on the Certificate of Need Web site at <https://chfs.ky.gov/agencies/os/oig/dcn>.

(4) "Days" means calendar days, unless otherwise specified.

(5) "Nonsubstantive review" is defined by KRS 216B.015(18).

(6) "Notice" means notice given through the cabinet's Certificate of Need Newsletter.

(7) "Office of Inspector General" means the office within the Cabinet for Health and Family Services that is responsible for licensing and regulatory functions of health facilities and services.

(8) "Office or clinic" means the physical location at which health care services are provided.

(9) "Party to the proceedings" is defined by KRS 216B.015(20).

(10) "Person" is defined by KRS 216B.015(22).

(11) "Proposed findings" means the submission of a proposed final order by the applicant or an affected party for review and consideration by the hearing officer.

(12) "Secretary" is defined by KRS 216B.015(26).

(13) "Show cause hearing" means a hearing during which it is determined whether a person or entity has violated provisions of KRS Chapter 216B.

Section 2. Filing. (1) The filing of documents required by this administrative regulation shall be made with the Office of Inspector General, Division of Certificate of Need, CHR Building, 5E-A, 275 East Main Street, Frankfort, Kentucky 40621 on or before 4:30 p.m. Eastern time on the due date.

(2) Filing of a document may be made by facsimile transmission or email if the document is received by the cabinet by facsimile transmission or email on or before 4:30 p.m. Eastern time on the due date.

(3) The Office of Inspector General, Division of Certificate of Need, shall endorse by file stamp the date that each filing is received and the endorsement shall constitute the filing of the document.

(4) In computing any period of time prescribed by this administrative regulation, the date of notice, decision, or order shall not be included.

(5)(a) Except as provided in paragraph (b) of this subsection, the last day of the period so computed shall be included.

(b) If the last day is a Saturday, Sunday, or legal state holiday, the period shall run until 4:30 p.m. Eastern time of the first business day following the Saturday, Sunday, or legal state holiday.

Section 3. Hearing. (1)(a) A hearing on a certificate of need application or revocation of a certificate of need shall be held by a hearing officer from the Cabinet for Health and Family Services, Division of Administrative Hearings.

(b) A hearing officer shall not act on any matter in which the hearing officer has a conflict of interest as defined by KRS 45A.340.

(c) A party may file with the cabinet a petition for removal based upon a conflict of interest supported by affidavit.

(2) The hearing officer shall preside over the conduct of each hearing and shall regulate the course of the proceedings in a manner that shall promote the orderly and prompt conduct of the hearing.

(3) Notice of the time, date, place, and subject matter of each hearing shall be:

(a) Mailed to the applicant and each affected person who requested the hearing not less than ten (10) days prior to the date of the hearing; and

(b) Published in the Certificate of Need Newsletter, if applicable.

(4)(a) By motion, pursuant to 900 KAR 6:065, Section 2(3), an applicant may challenge the standing of any person to request a hearing or participate in a public hearing.

(b) If a motion challenging the standing of a person is filed by an applicant, the hearing officer shall conduct an evidentiary hearing on the matter and obtain sworn testimony from the person. The applicant shall have the right to cross-examine the person.

(c) If the hearing officer determines that the person is located and residing solely outside of the Commonwealth of Kentucky, the hearing officer shall prohibit further participation by the person in the proceedings on the application at issue.

(d) If the hearing officer determines that the person is acting as a surrogate for another person who does not qualify as an affected person, the hearing officer shall prohibit further participation by the person in the proceedings on the application at issue.

(5) A public hearing shall be canceled if each person who has been determined to be acting as a surrogate for another person or who requested the hearing withdraws the request by giving written notification to the Office of Inspector General, Division of Certificate of Need, that the hearing is no longer required. The consent of each affected person who has not requested a hearing shall not be required in order for a hearing to be canceled.

(6) A dispositive motion made by a party to the proceedings shall be filed with the cabinet at least three (3) working days prior to the scheduled date of the hearing.

(7) The hearing officer may convene a preliminary conference.

(a) The purposes of the conference shall be to:

1. Formulate and simplify the issues;
2. Identify additional information and evidence needed for the hearing; and
3. Dispose of pending motions.

(b) A written summary of the preliminary conference and the orders thereby issued shall be made a part of the record.

(c) The hearing officer shall:

1. Record the conference; or
2. If requested by a party to the proceedings, allow a court reporter to be present at the expense of the requesting party.

(d) During the preliminary conference, the hearing officer may:

1. Instruct the parties to:

- a. Formulate and submit a list of genuine contested issues to be decided at the hearing;
- b. Raise and address issues that can be decided before the hearing; or
- c. Formulate and submit stipulations to facts, laws, and other matters;
- 2. Prescribe the manner and extent of the participation of the parties to the proceedings;
- 3. Rule on any pending motions for discovery or subpoenas; or
- 4. Schedule dates for the submission of prefiled testimony, further preliminary conferences, and submission of briefs and documents.

(8) At least five (5) days prior to the scheduled date of a nonsubstantive review hearing and at least seven (7) days prior to the scheduled date of any other certificate of need hearing, each affected person wishing to participate as a party to the proceeding shall file with the cabinet the following for each affected application and serve copies on all other known parties to the proceeding:

- (a) CON - Form 3, Notice of Appearance, incorporated by reference in 900 KAR 6:055;
- (b) CON - Form 4, Witness List, incorporated by reference in 900 KAR 6:055; and
- (c) CON - Form 5, Exhibit List, incorporated by reference in 900 KAR 6:055 and attached exhibits.

(9)(a) If a hearing is requested on an application that has been deferred from a previous cycle and for which a hearing had previously been scheduled, parties shall:

- 1. File a new CON - Form 3, Notice of Appearance; and
 - 2. Either:
 - a. Incorporate previously-filed witness lists (CON - Form 4) and exhibit lists (CON- Form 5);
- or
- b. File an amended CON - Form 4 and CON - Form 5.

(b) A new party to the proceedings shall file an original CON - Form 3, CON - Form 4, and CON - Form 5.

(c) Forms shall be filed in accordance with subsection (7) of this section.

(10)(a) If a party to the proceedings requests a court reporter to be present during the hearing, the party shall:

- 1. Arrange for and bear the cost for a court reporter to transcribe the hearing; and
- 2. File an original copy of the transcript with the cabinet.

(b) If all parties agree, the hearing may be recorded in lieu of a written transcript.

(11) The hearing officer shall convene the hearing and shall state the purpose and scope of the hearing or the issues upon which evidence shall be heard. Each party appearing at the hearing shall enter an appearance by stating the party's name and address.

(12) Each party shall have the opportunity to:

- (a) Present its case;
- (b) Make an opening statement;
- (c) Call and examine witnesses;
- (d) Offer documentary evidence into the record;
- (e) Make a closing statement; and
- (f) Cross-examine opposing witnesses on:
 - 1. Matters covered in direct examination; and
 - 2. At the discretion of the hearing officer, other matters relevant to the issues.

(13) A party that is a corporation shall be represented by an attorney licensed to practice in the Commonwealth of Kentucky.

(14) The hearing officer may:

(a) Allow testimony or other evidence on an issue not previously identified in the preliminary order that may arise during the course of the hearing, including a petition for intervention that may be filed;

(b) Act to exclude irrelevant, immaterial, or unduly repetitious evidence; and

(c) Question any party or witness.

(15) The hearing officer shall not be bound by the Kentucky Rules of Evidence. Relevant hearsay evidence may be allowed at the discretion of the hearing officer.

(16) The hearing officer shall have discretion to designate the order of presentation of evidence and the burden of proof as to persuasion.

(17) A witness shall be examined under oath or affirmation.

(18) A witness may, at the discretion of the hearing officer:

(a) Appear through deposition or in person; and

(b) Provide written testimony in accordance with the following:

1. The written testimony of a witness shall be in the form of questions and answers or a narrative statement;

2. The witness shall authenticate the document under oath; and

3. The witness shall be subject to cross-examination.

(19) The hearing officer may accept documentary evidence in the form of copies of excerpts if:

(a) The original is not readily available;

(b) Upon request, parties are given an opportunity to compare the copy with the original; and

(c) The documents to be considered for acceptance are listed on and attached to the party's Exhibit List (CON- Form 5).

(20) A document shall not be incorporated into the record by reference without the permission of the hearing officer. Each referenced document shall be precisely identified.

(21) The hearing officer may take official notice of facts that are not in dispute or of generally-recognized technical or scientific facts within the agency's special knowledge.

(22) The hearing officer may permit a party to offer, or request a party to produce, additional evidence or briefs of issues as part of the record within a designated time after the conclusion of the hearing. During this period, the hearing record shall remain open. The conclusion of the hearing shall occur when the additional information is timely filed or at the end of the designated time period, whichever occurs first.

(23) The hearing officer may, upon the agreement of the applicant, extend the review deadlines established by KRS 216B.062(1) and 216B.095(1).

(24) If all parties agree to waive the established decision date, the hearing officer shall render a decision within sixty (60) days of the filing of proposed findings.

(25) The cabinet shall forward a copy of the hearing officer's final decision by U.S. mail to each party to the proceedings. The original hearing decision shall be filed in the administrative record maintained by the cabinet.

Section 4. Show Cause Hearing. (1) The cabinet may conduct a show cause hearing on its own initiative or at the request of an affected person, to include hearings requested pursuant to *Humana of Kentucky v. NKC Hospitals, Ky.*, 751 S.W.2d 369 (1988), in order to determine if a person:

(a) Has established or is operating a health facility or health service in violation of:

1. The provisions of KRS Chapter 216B;

2. The provisions of 900 KAR Chapter 6; or

3. The terms or conditions that are a part of a certificate of need approval and license held by that person; or

(b) Is subject to the penalties provided by KRS 216B.990 for specific violations of the provisions of KRS Chapter 216B.

(2) The cabinet shall conduct a show cause hearing if a complaint investigation or licensure inspection by the Office of the Inspector General or the Kentucky Board of Emergency Medical Services reveals a possible violation of KRS Chapter 216B.

(3) Unless initiated by the cabinet, in order for a show cause hearing to be held, a request for a show cause hearing submitted by an affected person shall be accompanied and corroborated by credible, relevant, and substantial evidence, including an affidavit or other documentation that demonstrates probable cause to believe that a person:

(a) Has established, or is operating, a health facility or health service in violation of:

1. The provisions of KRS Chapter 216B;

2. The provisions of 900 KAR Chapter 6; or

3. The terms and conditions that were a part of a certificate of need approval and license held by that person; or

(b) Is subject to the penalties provided by KRS 216B.990 for specific violations of the provisions of KRS Chapter 216B.

(4) If a show cause hearing is requested by an affected person, the cabinet shall provide a copy of the request for show cause hearing to the person alleged to be in violation and the person shall have fourteen (14) days in which to file a response to the request and supporting documentation.

(5) Based upon the materials accompanying the request for a show cause hearing, and any subsequent response to the allegations, the cabinet shall determine if sufficient cause exists to conduct a hearing.

(6) Prior to convening a show cause hearing, the cabinet shall give the parties not less than twenty (20) days' notice of its intent to conduct a hearing and notice shall be published in the Certificate of Need Newsletter, if applicable.

(7) The notice shall include:

(a) The allegations against the person suspected or alleged to be in violation;

(b) Any facts determined to exist that support the existence of the allegation;

(c) The statute or administrative regulation alleged to have been violated;

(d) The person's response to the allegations, if any; and

(e) Notice of the time, date, place, and subject matter of the hearing.

(8) At least seven (7) days prior to a show cause hearing required or requested pursuant to KRS Chapter 216B, all persons or entities wishing to participate as a party to the proceedings shall file the following with the cabinet and serve copies on all other known parties to the proceedings:

(a) CON - Form 3, Notice of Appearance;

(b) CON - Form 4, Witness List; and

(c) CON - Form 5, Exhibit List.

(9) A show cause hearing shall be conducted in accordance with the provisions of Section 3 of this administrative regulation.

(10) If a show cause hearing is held, the person alleged to be in violation of KRS Chapter 216B shall have the burden of showing that the person:

(a) Has not established, or is not operating, a health facility or health service in violation of:

1. The provisions of KRS Chapter 216B;

2. The provisions of 900 KAR Chapter 6; or

3. The terms and conditions that are a part of a certificate of need approval and license held by that person; or

(b) Is not subject to the penalties provided by KRS 216B.990 for specific violations of the provisions of KRS Chapter 216B.

(11) If it is alleged that an office or clinic offering services or equipment covered by the State

Health Plan was established or is operating in violation of KRS 216B.020(2)(a), the hearing officer shall base his or her recommended findings of fact, conclusions of law, and recommended decision on whether the clinic or office meets the physician exemption criteria established in 900 KAR 6:130.

(12) Within thirty (30) days of the conclusion of the hearing, the hearing officer shall tender findings of fact and a recommended decision to the Office of Inspector General, Division of Certificate of Need for submission to the secretary. A copy of the findings of fact and recommended decision shall be forwarded to each party and the party's legal representative by the Division of Certificate of Need.

(13) Each party shall have fifteen (15) days from the date the recommended decision is forwarded by the cabinet to file exceptions to the findings of fact and recommended decision with the Office of Inspector General, Division of Certificate of Need, for submission to the secretary and the hearing officer.

(14) Within thirty (30) days of the receipt of any exceptions, the secretary shall either accept the hearing officer's recommended decision or request changes. The hearing officer shall then prepare a final decision for the secretary's signature.

(15) The Office of Inspector General, Division of Certificate of Need shall mail a copy of the final decision to each party and his or her legal representative with the original hearing decision filed in the administrative record maintained by the cabinet.

(16) If a violation is found to have occurred as a result of a show cause hearing conducted pursuant to subsection (1) of this section, the cabinet shall take action as provided by KRS Chapter 216B.

(17) If the person is found to have violated any of the terms or conditions of any certificate of need approval and license as a result of a show cause hearing conducted pursuant to subsection (1) or (2) of this section, the cabinet shall take the action required by this subsection.

(a) If the person had not previously been found to be in violation of the terms and conditions that were made a part of the person's certificate of need approval and license, the person shall be given a period of time, not to exceed sixty (60) days after issuance of the cabinet's decision, in which to demonstrate that the violation has been corrected. At the conclusion of this period, the cabinet shall verify that the facility or service is operating in compliance with the terms or conditions of the certificate of need and license at issue.

(b) If the cabinet is unable to verify that the facility or service has corrected the violation in accordance with paragraph (a) of this subsection, or if a person who had previously been found to be in violation of the terms and conditions that were a part of the person's certificate of need approval and license is found in a subsequent show cause hearing conducted pursuant to this section to be in violation of the terms and conditions again, the matter shall be referred to the Office of Inspector General for appropriate action.

(18) The deadlines established with respect to hearings shall be modified if agreed to by all parties and the hearing officer. (36 Ky.R. 244; Am. 811; eff. 10-21-2009; 39 Ky.R. 331; 807; 982; eff. 11-9-2012; 42 Ky.R. 550; 1784; eff. 12-16-2015; 4 Ky.R. 140, 524; eff. 9-20-2017; 47 Ky.R. 1693, 2594; eff. 6-16-2021.)